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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 603

WILLIAM L. BUCHNER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN R. FITZPATRICK
EDWARD J. LYNCH
1406 G St. N. W.
Washington 5, D. C.

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No.

WILLIAM L. BUCHNER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, William L. Buchner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on October 30, 1958. (App. 1a).

CITATIONS TO THE OPINIONS BELOW

The United States District Court for the District of Columbia which found the defendant guilty after a jury trial on June 3, 1958, did not render any opinion. The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth at page 82 of the record. (App. 1a)

JURISDICTION

The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 30, 1958. Petition for rehearing en banc was timely filed. Said petition was denied on the 24th day of November, 1958. (App. 2a) Petitioner timely filed an application for a stay of the mandate or to stay transmission of the certified copy of the judgment. The Court of Appeals stayed to December 26, 1958 the mandate or transmission of a certified copy of the judgment pending application to this Court for certiorari—The jurisdiction of this honorable court is invoked under 28 U. S. C. Section 1254.

STATEMENT OF QUESTIONS PRESENTED

This case involves three questions:

(1) Can a police officer enter a private apartment house without permission from anyone in authority and without a warrant and obtain evidence which would result in the issuance of an arrest and search warrant for the occupant of a particular apartment.

(2) Did the trial court err in refusing to instruct the jury on the question of wire tapping when there was certain evidence in the record concerning the probability that some person was listening on telephone wires at the times involved in this case.

(3) Can a police officer legally obtain evidence on which to base a search warrant when said evidence is obtained by pressing against a private individual's door in a private apartment house and overhearing one person speaking. Further, whether or not the actions of the police officer constituted a trespass which would make the evidence illegal.

STATUTES AND RULES INVOLVED

The pertinent statutes are Amendments IV and Amendment V of the Constitution of the United States. (App. 2a).

Title 47 U. S. Code page 605 (App. 3a).

Title 22 D. C. Code, section 1501; section 1502; section 1504; section 1505. (App. 4a-5a)

Title 22 D. C. Code, section 1801. (App. 6a).

Title 22 D. C. Code, section 3102. (App. 6a).

Rule 41, Federal Rules of Criminal Procedure for the United States District Courts, sections (a), (b) (c) (e). (App. 7a-8a).

STATEMENT OF THE CASE

This case presents for correction errors of the U. S. District Court for the District of Columbia in a criminal trial of the Petitioner.

The petitioner, William L. Buchner, an individual, was indicted by a grand jury in the District of Columbia in Criminal No. 339-58, United States District Court for the District of Columbia, on the 8th day of April, 1958 (R. 1-2). He was accused of violation of Title 22, Sections 1501, 1502, 1504, and 1505 of the District of Columbia Code. These charges were respectively as follows. Operating a lottery; setting up a gaming table; permitting the maintaining of gambling premises at 2500 K Street, N. W., Apartment 301, Washington, D. C.; and possession of lottery tickets. Defendant entered a plea of not guilty to said charges (R. 2) and thereafter, within the proper time, filed a motion to suppress certain articles

that were seized when the defendant was arrested on the 12th day of February, 1958 (R. 3). Defendant filed an affidavit is support of said Motion (R. 4-5) with points and authorities attached thereto. After the hearing on the Motion to suppress the evidence, the lower court took the matter under advisement and on May 12, 1958, the court rendered a memorandum opinion denying the Motion to suppress evidence (R. 6-11). Thereafter, on, to wit, May 29, June 2 and June 3, 1958, the defendant was tried and convicted of the charges heretofore set forth. *(Infra,* p. 1)

During the trial, timely motions were made (R. 19, 20, 21, 22), by the defendant's counsel, to suppress the evidence seized on the date of the arrest, namely, February 12, 1958. The Trial Court conducted a hearing and took testimony out of the presence of the jury concerning the question of whether or not the arrest, search and seizure were valid. At the conclusion of the testimony the Court ruled against the Petitioner and allowed the prosecution to introduce all of such evidence and articles seized. (R. 19, 20, 21, 22) Timely objection was made by Petitioner's attorney to the introduction of all of said evidence at the trial (R. 47, 49, 50, 51, 59, 60).

During the course of the trial motions and objections were made by petitioners counsel which raised the following additional questions:

(a) That the court erred in refusing to instruct the jury concerning certain evidence or testimony in the record, which referred to some person or persons listening at telephone wires which could have lead to the defendant's apartment during the times which are subject of this indictment.

(b) That the court erred in admitting what a police officer heard through a door in a private apartment building and against a private individual's door and which testimony was a part of the evidence used to convict the petitioner.

Petitioner was convicted on June 3, 1958, on all four counts of the indictment, and motion for new trial was filed and a hearing held and the motion was denied. He was sentenced on the 27th day of June, 1958. As a consequence the appeal from said conviction was filed.

REASONS FOR GRANTING THE WRIT

There is here presented an important question of Federal law involving searches and sezures under the Constitution of the United States and the Federal Rules of Criminal Procedure.

The Court below decided against the Petitioner and ruled that the hallways of a private apartment building were available to police officers for the purpose of obtaining evidence for use in obtaining a search and arrest warrant. The officer did not have permission from anyone to be in the building. This appears to be in conflict with a decision of this Court. No United States Court of Appeals has rendered any decision on this question.

In addition, the Court below also erroneously ruled that the Petitioner did not have a right to an instruction to the jury concerning wire tapping. Involved is the meaning to Title 47, United States Code section 605.

ARGUMENT

I

IT IS A VIOLATION OF THE RIGHTS OF AN INDIVIDUAL UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES FOR A POLICE OFFICER TO ENTER THE HALLWAYS OF A PRIVATE APARTMENT BUILDING TO MAKE OBSERVATIONS AND, BASED THEREON, TO OBTAIN SEARCH AND ARREST WARRANTS WHEN THE OFFICER DID NOT HAVE PERMISSION TO ENTER THE BUILDING FROM THE OWNER, ANY OCCUPANT, THE PERSON OBSERVED, OR ANY AUTHORIZED AGENT.

After indictment of the petitioner, and prior to trial, timely motion to suppress the evidence and return the seized property was filed. (R. 3) On May 2, 1958, a hearing was held before Judge Edward A. Tamm in the United States District Court on the motion. On May 12, 1958, Judge Tamm rendered a memorandum opinion, six pages in length, which denied the motion. (R. 6-11)

As will appear from the testimony of Elbert A. Andrews, Private, Metropolitan Police Department of the District of Columbia (R. 21-38) the officer made all the observations upon which the search warrant (R. p. 249) was based. His testimony indicates (R. 21-38) that he entered a private apartment house at 2500 K Street, N. W., Washington, D. C., on numerous occasions by various entrances and that at no time did he have permission from the owners, managers, petitioner, or other occupants of any apartment in the building to enter it. His admitted purpose was to make observations on Apartment No. 301, in which was subsequently found, upon the execution of the search warrant, the defendant and the articles seized in said apartment. There was no other testimony by anyone that any permission had been obtained for the police officer to be in said building.

It is the Petitioners contention that the entrance by Private Andrews on each and every occasion into the apartment building was without permission of any authorized person, occupant or the Petitioner and that the law requires that such permission must be obtained to validate the warrant, subsequent search and seizure in Apartment 301 and arrest of the defendant.

Petitioner relies on the statements contained in the concurring opinion of Mr. Justice Jackson of the United States Supreme Court in the case of *McDonald* v. *United States*, 335 U. S. 451, where at page 453 of the opinion he said:

> "It seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entering."

See Title 22 Section 180 the District of Columbia Code (App. 6a).

Title 22, Section 3102 of the District of Columbia Code, (App. 6a) Petitioner contends, comples the conclusion that Officer Andrews, in the instant case had no more right to enter the building than the officers in the case of *McDonald* v. *U. S., infra.*

The pertinent portion of said statute states,

> "Any person who, without lawful authority, shall enter, or attempt to enter, a private dwelling or building against the will of the lawful occupant thereof, or being therein, without lawful authority to remain therein, without lawful authority to remain therein, shall refuse to quit the same on the demand of the lawful occupant there-

of, * * *, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished * * *"

Petitioner believes that because Officer Andrews did not have lawful authority to enter the building, and constructively was there against the will of the occupants, the owner and/or agents of the owner, and also against the will of the Petitioner herein who was the occupant of Apartment 301, that the search warrant was illegal and as a consequence articles seized were wrongfully seized; that the Petitioner was wrongfully arrested, and that the testimony of Private Andrews, Officer Kissner, Officer Foran and Officer Layton was wrongfully admitted as to what was found in the apartment.

Although the *McDonald* case *infra* had a slightly different factual basis, the law enunciated by Justice Jackson should apply to this case.

This is particularly so because Justice Jackson in writing what he did specifically set forth that he believed, that the court should make clear the reason why the arrest in that case was invalid.[1]

On page 458 of his concurring opinion, he said, *inter alia,*

"Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging land lady or doorman, they would have been legally in the hallways. * * *"

[1] In the *McDonald* case, Mr. Justice Jackson concurring said "I agree with the result and with the opinion of the court. But it rejects the search which two courts below have sustained without saying wherein it was wrong. It may be helpful to lower courts and to the police themselves to state what appears to some of us as the reason this search is bad."

Certainly, considering the prohibitions contained in Title 22. Section 3102 of the District of Columbia Code (App. 6a) and the interpretation of Justice Jackson in the *McDonald* case, the Officer (Andrews) had no right in the building at the times he made the observations of Apartment 301; this also included the overhearing of the voice of the Petitioner through the doorway of Apartment 301. These actions were not legal and all of said evidence should be suppressed. Since the search warrant of premises Apartment 301 and the arrest warrant for the Petitioner was based solely on these observations and the overheard statements, any evidence obtained thereafter was invalid.

Certain other cases come to mind which have dealt with, in general, the same problem.

The lower court in overruling Petitioner's Motion to Suppress evidence relied most heavily on the case of *U. S.* v. *Hayden* (140 Fed. Supp. 429) which was decided May 1, 1956 by the United States District Court for the District of Maryland (R. 6-11). That case was one involving violation of the alcohol and tobacco tax laws. The Defendant in the case was known by investigators to be a major violator. They also learned that he had a certain truck that he used to transport liquor. The police then began to observe the defendant's activities for a number of months. Finally, one of the agents who had been keeping the defendant under observation saw that the defendant's personal car was in front of a dry cleaning plant owned by him and that the truck was gone. The agent finally located the truck and followed it for a while and then lost it. He returned to the cleaning plant and saw the truck parked in the driveway. He looked through the rear window of the truck and saw a partially cov-

ered cardboard container which was the type and size customarily used to carry jars of illegal liquor. He also detected the odor of liquor. He then notified his superior who, upon his arrival, also looked into the truck through the rear window. Observation was then continued on the premises from across the street. The following morning the defendant arrived at the premises, entered the truck and backed it into an open shed. He then opened the rear door and carried a carton from the truck into the shed. The officers then drove onto the defendant's property and questioned him. One of the officers saw in the rear of the shed a carton covered by a burlap bag. Defendant was arrested and some non-tax paid liquor was found in the carton and seized. The officers did not have a warrant. The court ruled that a warrant was not necessary and that the arrest, search and seizure were proper.

The court in deciding the case relied in part on the following decisions:

Jones v. *U. S.* (1924) 296 F. 632;
Benton v. *U. S.* (1928) 28 F. 2d 695;
Janney v. *U. S.* (1953) 206 F. 2d 601;
U. S. v. *Williams* (1955) 227 F. 2d 149.

All of these cases involved mere entry and observation on land of the different defendants.

The lower Court was careful to point out that actions of officers in open fields have been expressly excluded from the purview of the 4th Amendment. It cited *Hester* v. *U. S.* (1924) 265 U. S. 57; 44 S. Ct. 445; 68 L. Ed. 898.

Consider the language of the 4th Amendment which states *inter alia*, "The rights of the people to be

secure in their persons, *houses*, papers and effects against unreasonable searches and seizures shall not be violated * * *." (Emphasis supplied.) This seems to make it clear that this case is entirely different from the matter before the court.

The lower Court further relied on *Whitley* v. *U. S.* (1956) 99 U. S. App. D. C. 159, 237 F. 2d 787. In that case the police entered a rooming house, noticed a person in the bathroom on the 3rd floor and then entered the bathroom and arrested her. They then went through a window from the bathroom to a porch and from the porch they looked into a bedroom and saw a person named Meredith preparing to give herself a hypodermic injection. They entered the bedroom, searched it, and found narcotics. In that case the Court said:

> "The arrest of Meredith, also, does not appear to have been legal and therefore does not justify the search and seizure. Since the porch from which the police saw Meredith was not open to the public, and the police reached it through a window, they had no right to be on the porch, whatever may be thought of their previous presence in the relatively public corridors of the rooming house. It follows that what they saw from the porch, even if it gave them probable cause to believe that Meredith had committed a felony, did not justify them in arresting her." *McDonald* v. *U. S.*, 335 U. S. 451; 69 S. Ct. 191; 93 L. Ed. 153.

The Court appears in the *Whitley* case to have followed the *McDonald* case without specifically ruling on the significance of the officers' presence in the corridors of the rooming house. Appellant can only assume that this court did follow the reasoning of Justice

Jackson, which was concurred in by Justice Frankfurter, concerning presence without right in the corridors of a private apartment house.

In the case of *U. S.* v. *Jeffers*, 342 U. S. 48; 96 L. Ed. 59; 72 S. Ct. 93, officers were let into a hotel room by the manager because they suspected that narcotics were secreted there. This was not the room of the defendant but he had permission from its lawful occupant to use it. Under these circumstances, the court ruled the search illegal. The Court said, *inter alia*,

> "* * * The officer not only proceeded without a warrant or other legal authority but their intrusion was conducted surreptitiously and by means denounced as criminal."

Following this reasoning, it would seem that the officer in the instant case who made the observations in the hallway of a private apartment house was just as surreptitious.

In the *McDonald* case, (*infra*, p. 14) Defendant McDonald was under observation for suspected violation of the lottery laws. While he was maintaining a home in the District of Columbia, he rented a room in a rooming house in the District. Police observed him for about 2 months. On the day of the arrest, in the middle of the afternoon three officers were outside the premises and heard an adding machine. Believing that the numbers game was in process they sought admission to the house. One of the officers found a window leading to the landlady's room and climbed through it. He identified himself to her and admitted the others. Coming to the closed doorway of the room occupied by the defendant on the 2nd floor they stood on a chair, looked through the transom and observed the

defendant in the room as well as number slips, money and adding machines. They yelled to the defendant to open the door and he did so. An arrest and search followed.

Finally, in *Silverthorne Lumber Company* vs. *U. S.*, 40 S. Ct. 182; 251 U. S. 385; 64 L. Ed. 319, Mr. Justice Holmes wrote in part,

> "* * * The essence of a provision forbidding the acquisition of evidence in a certain way is not that mere evidence so acquired shall not be used before the Court but that it shall not be used at all. * * *"

II

EVIDENCE HAVING BEEN INTRODUCED ON THE PART OF THE DEFENDANT, RAISING THE DEFENSE OF ILLEGALLY OBTAINED EVIDENCE, i.e. "WIRETAPPING"; DEFENDANT WAS ENTITLED TO HAVE INSTRUCTIONS TO THE JURY COVERING THE ISSUE.

During the trial, the Petitioner produced the testimony of Randolph Shorter. (R. 38-48) He testified that he was the janitor who worked at 2500 K Street, N. W., and that on one of the days when Officer Andrews was observing the premises, he saw a man he could not identify by name, in the basement of the apartment house with lines attached to a telephone panel and with earphones over his head. From this the jury could have assumed that the person was listening on a telephone wire. He further testified that some of the wires in the box led to apartment 301. He stated that he could identify the person if he ever saw him again. From his testimony it also could be concluded that the person seen was not a telephone company employee, since he did not have any identifying badges on his clothing, nor did he have any equipment by way of tools, work belts, or any other thing

which would lead to a conclusion that it was a telephone company employee.

By this testimony, there was a question of fact as to whether or not the defendants' telephone lines were tapped illegally against the requirements and in violation of section 605, title 47 of the United States Code (App. 3a) which prohibits the interception of telephone communications, without permission. The defendant appellant was entitled to a requested jury instruction which he submitted at the proper time, and which was refused by the Court and which stated as follows:

DEFENDANT'S INSTRUCTION NO. 6

"Title 47, Section 605 of the United States Code prohibits the use of any information received as the result of any so-called 'wire-tapping.'" If you find, in this case that such information so received became the basis of any evidence in this case, then you must acquit the defendant on all counts of the indictment."

Under the law, once relevant testimony has been admitted for consideration by a jury, the court is required to give instruction, when requested, covering said evidence.

The testimony of Randolph Shorter was not objected to by the prosecution and was therefore a matter the jury could consider. Appropriate instructions should have been made covering this testimony.

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[2] *U. S.* v. *Coplan*, C. A. N. Y. 1950, 185 F. 2d 629, cert. den. 72 S. Ct. 362, 342 U. S. 920, 96 L. Ed. 690, held that wire tapping is forbidden by this section and evidence obtained may not be used against a victim of this violation.

The time or apparent time of the occurrence, as testified to by the witness, was during the same period when Officer Andrews was obtaining the evidence he testified about in the apartment building. Randall's instructions to juries states in vol. 1, page 301—Section 318:

> "Where there is evidence in a criminal case reasonably raising a defensive issue, the defendant is entitled to instructions affirmatively presenting such issue."
>
> See *Key* v. *State*, (Texas) 161 S. W. 130;
> *Tatum* v. *U. S.* (1951) 88 U. S. Appeals D. C. 386, 190 F. 2d 612;
> *Lufty* v. *U. S.* (9 Cir.) (1952) 198 F. 2d 760, 33 A. L. R. 2d 879;
> *Kinard* v. *U. S.* (1938) 68 App. D. C. 250, 96 F. 2d 522;
> *U. S.* v. *Blount* (1956) 229 F. 2(d) 669;
> 53 Am. Jur. Section 580 and 650;
> *Bird* v. *U. S.*, 180 U. S. 356, 21 S. Ct. 403, 45 L. Ed. 570.

Petitioner by his motion for a new trial raised all of the above questions and the motion was denied. In addition on the motion for a new trial Petitioner contended, and he believes rightfully so, that because of the testimony of Officer Andrews (R. 21-38), that his ear was in physical contact with the door of Apartment 301, which was occupied by the Petitioner, that this constituted a trespass, since the officer testified that he did not have the permission of anyone, including the Petitioner, to be in the building or at the door.

In the argument herein (*infra*, page 10) *McDonald* vs. *U. S.* has been discussed in detail wherein Justice Jackson in his concurring opinion held that, *inter alia*,

"Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger they could then spy on every tenant or others without being trespassers. * * *"

Certainly the inference, from the above quotation, is that a trespasser could not obtain legal evidence. Since Officer Andrews in his testimony has stated that he had his ear against the door of the Petitioner's premises, then he committed a trespass and this makes what he heard illegally obtained evidence.

To reverse the first sentence of the above quotation it seems Justice Jackson says that, in the absence of permission from an obliging landlady or any other tenant or doorman, the Officer would have been illegally in the hallway.

CONCLUSION

The court below erred in failing to exclude the testimony of the police officers, the allowance of the testimony being a violation of the provisions concerning unreasonable searches and seizures and due process of law as contained in Amendments Four and Five of the Constitution of the United States. It was further a violation of the provisions of Rule 41 of the Federal Rules of Criminal Procedure.

Further error was committed when the Court failed to instruct the jury concerning the evidence of wire tapping which was present in the testimony. From all of the foregoing the verdict of the Court below should be reversed.

Respectfully submitted,

JOHN R. FITZPATRICK
EDWARD J. LYNCH

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14540

WILLIAM L. BUCHNER, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the District of Columbia

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Decided October 30, 1958

Mr. John R. Fitzpatrick, with whom *Mr. Edward J. Lynch* was on the brief, for appellant.

Mr. Walter J. Bonner, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee. *Mr. Alfred Hantman*, Assistant United States Attorney, also entered an appearance for appellee.

Before EDGERTON, DANAHER and BURGER, *Circuit Judges*.

PER CURIAM: This appeal is from a conviction and sentence for violations of the District of Columbia gambling laws. We find no error.

Affirmed.

Circuit Judge Burger would dismiss the appeal as frivolous.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1958

No. 14,540

WILLIAM L. BUCHNER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Before: PRETTYMAN, Chief Judge, EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the court that the aforesaid petition is denied.

Dated: November 24, 1958

Per Curiam.

STATUTES

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 47 United States Code 605

No person receiving or assisting in receiving, or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge

or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: PROVIDED, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934, ch. 652, Par. 605, 48 Stat. 1103).

Title 22 District of Columbia Code 1501

Lotteries—Promotion—Sale or possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell, or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or adver-

tising a policy lottery policy shop or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, par. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, par. 1.)

Title 22 District of Columbia Code 1502

Possession of lottery or policy tickets.

If any person shall within the District have in his possession knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Par. 2.)

Title 22 District of Columbia Code 1504

Gaming—setting up gaming table—inducing play.

Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called ABC, faro bank, EO, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by imprisonment for a term of not more than five years. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, Par. 865.)

Title 22 District of Columbia Code 1505

Permitting gaming table or device to be set up.

Whoever in the District knowingly permits any gaming table, bank, or device to be set up or used for the purpose

of gaming in any house, building, vessel, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which at the time he has possession or control, shall be punished by imprisonment in the jail for not more than one year or by a fine not exceeding five hundred dollars or both. (Mar. 3, 1901, 31 Stat. 1331, Ch. 854, Par. 966.)

Title 22 District of Columbia Code 1801

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years. (Mar. 3, 1901, Stat. 1323, ch. 854, Par. 823.)

Title 22 District of Columbia Code 3102

Any person who, without lawful authority, shall enter, or attempt to enter, a private dwelling or building against the will of the lawful occupant thereof, or being therein, without lawful authority to remain therein, shall refuse to quit the same on the demand of the lawful occupant thereof; or any person who, without lawful authority, shall enter, or attempt to enter, an unoccupied private dwelling or building against the will or consent of the lawful owner thereof, or his duly authorized agent or being therein, without lawful authority to remain therein, shall refuse to quit the same on the demand of the lawful owner thereof, or his duly-authorized agent, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding fifty dollars or imprisonment in the jail for not more than six months, or both, in the discretion of

the court. (March 3, 1901, 31 Stat. 1324, ch. 854, Par. 824; Mar. 4, 1935, 49 Stat. 37, ch. 23.)

RULES

Rule 41, Federal Rules of Criminal Procedure for the United States District Courts

(a) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., par. 957.

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that the grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the means of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith

the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be searched at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

No. 603

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM L. BUCHNER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN
Solicitor General

MALCOLM ANDERSON
Assistant Attorney General

BEATRICE ROSENBERG
PAUL J. RONIVES
Attorneys

Department of Justice, Washington, D.C.

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OCTOBER TERM, 1958

No. 603

WILLIAM L. BUCHNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a) is not yet reported. The memorandum opinion of the district court denying petitioner's motion to suppress evidence (J.A. 6–11)[1] is reported at 164 F. Supp. 836.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1958. A petition for rehearing en banc was denied on November 24, 1958. The petition for a writ of certiorari was filed on December 24, 1958.

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether information leading to the issuance of the warrant was improperly obtained by a police officer.

2. Whether the trial judge correctly refused to submit to the jury the issue of whether evidence was obtained through wiretapping.

STATEMENT

Petitioner was convicted in the District Court for the District of Columbia on four counts of lottery operations in violation of 22 D.C. Code 1501, 1502, 1504 and 1505 (J.A. 1-2, 80). He was sentenced to six to eighteen months each on counts one and two, and six months each on counts three and four, all sentences to run concurrently (J.A. 13–14). The court of appeals affirmed *per curiam*.

Prior to trial, petitioner moved for return of seized property and suppression of evidence (J.A. 3–5). He alleged that as the occupant of an apartment he had an interest in the privacy of its hallways and approaches and that the police officer who had obtained the information leading to the issuance of the search and arrest warrants had trespassed upon this interest in that he entered the apartment building and listened to petitioner through the door of his third-floor apartment. The motion was denied, the district judge stating in a memorandum opinion that the case was distinguishable from *McDonald* v. *United States*, 335 U.S. 451, in that there was no forcible entry as in *McDonald*, and further citing cases to the effect that

even if a technical trespass had been committed it was not a violation of the Fourth Amendment (J.A. 6–11). At the trial petitioner renewed his objections before the first government witness was sworn (J.A. 19). He alleged at this stage that the action of the police officer was more than a technical trespass and constituted a misdemeanor of unlawful entry under 22 D.C. Code 3102 (Pet. 6a), and further that the police had tapped petitioner's telephone. After the first government witness was sworn, petitioner objected that the testimony he would give would be inadmissible since he was the police officer who had obtained the information leading to the issuance of the warrants (J.A. 21). The jury was excused at this point (J.A. 23).

Examination of the witness before the judge revealed that the police had received information on February 3 and 4, 1958, partly from a source proved reliable in the past, that a numbers racket was being conducted from a certain telephone number (J.A. 23). The number was checked and learned to be for a telephone in petitioner's apartment (J.A. 24–25). The witness went to the apartment house on February 6 and listened through the door to petitioner (later identified by his voice) talking on the telephone and taking bets (J.A. 25–26). The officer returned to the apartment on February 7, 8, 10, and 11, each time hearing petitioner taking bets over the telephone (J.A. 27–31). He had pressed his ear to the door of petitioner's apartment or kept within six inches of it when he overheard petitioner (J.A. 34–35). On February 12, he applied to the United States Commissioner for a search warrant and an arrest warrant, which were

executed the same day (J.A. 31). On cross-examination, the witness stated that he had been given no authority by anyone connected with the apartment building to enter the building (J.A. 32). On one or more occasions he entered an adjoining building and reached his destination through a connecting basement passageway (J.A. 32). He stated that he did not know how to tap a wire, and did not know of any wiretapping in conjunction with the case (J.A. 33–34). On redirect examination, the witness stated that he had seen some men in the basement who were apparently installing a telephone, and that he had seen a telephone truck parked outside the building (J.A. 36–37).

Petitioner then called the janitor of the building who testified that he had seen some men in the basement also, and that to the best of his knowledge no one had reported any telephone trouble (J.A. 38–39, 40). One of the men, with whom he talked, had two prongs with wires attached to the telephone box, and earphones (J.A. 39). On cross-examination, the janitor stated that he did not recognize any of the witnesses in the case as being among the men he had seen in the basement (J.A. 40). He did not know whether the men were hooked up to petitioner's phone or not (J.A. 41). Petitioner's motion for suppression was thereupon denied (J.A. 47).

When the jury was recalled, the police officer substantially repeated his testimony for the government (J.A. 47–55), and the janitor testified as a witness for petitioner (J.A. 62–65). Petitioner requested that an instruction be given to the jury that if they believed any of the evidence was obtained through the means

of tapping wires they were to find petitioner not guilty. The request was refused, the judge commenting that there was no evidence on the matter (J.A. 66).

ARGUMENT

1. The motion to suppress was properly denied because the evidence was seized under a search warrant which was valid and legal. Petitioner alleges that the information on which the search warrant was based was obtained by illegal action on the part of the police. He alleges in particular that the investigating officer was a trespasser when he overheard petitioner taking bets, through the door of his third floor apartment. However, the officer did not gain entrance to the apartment building by the use of force, as in *McDonald* v. *United States,* 335 U.S. 451. Petitioner's assertion must therefore rest upon the broad grounds that the officer committed a trespass when he entered the apartment building. To state the problem is very nearly to answer it. The common hallways and entrances of a large apartment building are accessible to the general public. That the owner of the building may, for the convenience and security of his tenants, take steps to keep out undesirable persons is of no help to petitioner here since there is no showing of any such steps taken by the owner. Any assertion that petitioner, had he known of the officer's presence, would have tried to have him barred, in effect a constructive prohibition, would appear to be of no more significance in this type of a case than the doctrine of trespass *ab initio,* uniformly rejected by this Court as a basis for challenging the admission of evidence.

McGuire v. *United States*, 273 U.S. 95; *On Lee* v. *United States*, 343 U.S. 747, 752. Moreover, even if there had been a technical trespass, it is the import of these and related cases that the protection of the Fourth Amendment extends to cases of substantial intrusions into "The right of the people to be secure in their persons, houses, papers, and effects * * *" and not to mere technical violations of the laws of civil trespass. *Hester* v. *United States*, 265 U.S. 57, 59; *On Lee* v. *United States*, *supra*. Particularly should this be so where there was no search conducted at that time, but only later, when a warrant was issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Petitioner's contention that the officer violated the provisions of the District Code relating to unlawful entry is similarly without substance. The question is solely one of local law, and both courts below apparently concluded that there was no violation. That there was no such violation is clear, moreover, from the very terms of the statute. The statute forbids entry into a building "against the will" of the owner or occupant (22 D.C. Code 3102, Pet. 6a). Since entrance to the apartment building was open to the general public without restriction, some showing of a specific intent to exclude police officers would be required, and none was made. While the police officer could perhaps have reasonably inferred that petitioner would not want him to be in the building, a single tenant of a large apartment building obviously cannot be said to "own" or "occupy" the entrance and hall-

ways to which he has only a limited right of use. Entrance into such an area could violate § 3102 only if "against the will" of the landlord, and there was no manifestation of any such intent by the landlord.

2. Petitioner's argument that the question of wiretapping should have been left to the jury overlooks the clear dictates of the two *Nardone* cases. The question concerns the admission of evidence or its exclusion. *Nardone* v. *United States*, 302 U.S. 379, 380. The proper procedure to be followed when a defendant wishes the judge to pass on the admissibility of evidence allegedly so obtained is outlined in *Nardone* v. *United States*, 308 U.S. 338, 341–342. There is no warrant in law for submitting such an issue to the jury. And here, as the district judge pointed out, there is no evidence of wiretapping by the government. Finally, petitioner points to no evidence that could have been the fruits of the alleged wiretapping. To the contrary, his own claims show that at the date of the alleged taps the police officer had already overheard petitioner taking bets through the door of his apartment and that the warrants were issued on the basis of that evidence.

CONCLUSION

There was no error in overruling petitioner's motion to suppress. It is respectfully submitted that the petition for a writ of certiorari be denied.

J. LEE RANKIN,
Solicitor General.
MALCOLM ANDERSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL J. KOMIVES,
Attorneys.

JANUARY 1959.